IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GLADYS KNIGHT-MCDOWELL, Plaintiff, v. RIVAL GROUP, LLC, CASCADE FOODS, LLC, GRANITE FOODS, LLC, and SHANGA HANKERSON, Defendants.	:	CIVIL ACTION NO. 1:16-CV-03160-LMM

ORDER

This case comes before the Court on Defendant Hankerson's Motion to Set Aside Default [14], Defendants Rival Group, Cascade Foods, and Granite Foods Objection to Default [15], and Plaintiff's Motion for Default Judgment [19]. After due consideration, the Court enters the following Order:

I. BACKGROUND

Plaintiff first filed this action against Defendants on August 26, 2016. Dkt. No. [1]. On August 29, 2016, Plaintiff filed her First Amended Complaint, alleging unfair competition and false advertising in violation of the Lanham Act, 15 U.S.C. § 1125(a). Dkt. No. [4] ¶ 36.

The case arises from a written agreement ("the Agreement") entered into by Plaintiff and her son, Defendant Hankerson, on behalf of his business, Rival

Group. Id. ¶ 11. In the written agreement, Plaintiff granted Rival a license to use her intellectual property in connection with an Atlanta restaurant, Gladys Knight Chicken and Waffles Restaurant ("the Restaurant"), in exchange for monthly royalty payments based on Rival's annual adjusted gross revenue. Id.

The Agreement states that the license is "intended merely as a consent to the use of [Plaintiff's] name and likeness. It does not constitute an assignment of, or a grant of a license to any trademarks or service marks [Plaintiff] now owns or later adopts." Id. ¶ 12.

The Agreement was for a term of ten years with the possibility of a subsequent ten-year renewal upon mutual agreement. Id. ¶ 13. Plaintiff had the right to terminate the Agreement sooner if Hankerson ceased affiliation with Rival or the Restaurant. Id.

The Agreement expired on March 4, 2009. Id. ¶ 17. According to Plaintiff, Rival continued using Plaintiff's likeness in connection with the Restaurant pursuant to an oral license granted by Plaintiff (the "Oral Agreement"). Id. ¶¶ 14, 18. Plaintiff similarly alleges that Cascade Foods and Granite Foods, also owned by Hankerson, each operated a Gladys Knight Chicken and Waffles Restaurant under a similar oral license from Plaintiff. Id.

According to Plaintiff, the Oral Agreement was contingent upon the Restaurants continuing to provide goods and services equivalent to those required under the Agreement. Id. ¶ 18. Additionally, the Oral Agreement was contingent upon Rival, Cascade Foods, and Granite Foods not engaging in any intentional or reckless activity which might harm Plaintiff's name and reputation. Id.

Plaintiff claims she terminated the Oral Agreement in 2016 by orally informing Hankerson that the license to use her likeness was terminated. Id. ¶ 20. The termination was later memorialized in a formal letter to Hankerson on July 21, 2016. Id. ¶ 21.

Around this time, the State of Georgia initiated a civil action against Hankerson and his business entities in the Superior Court of Clayton County under the Georgia Racketeer Influenced and Corrupt Organizations Act and the Georgia Uniform Civil Forfeiture Procedure Act ("State Action"). Id. ¶ 24. On July 22, 2016, the state court issued an order ("the Receiver Order") appointing a receiver ("the Receiver") to run the Restaurants. Id. ¶ 25.

The Receiver Order dictates that the Receiver would have, for the period of his tenure, the ability to exercise all powers of the directors, officers, and managers of Rival, Cascade Foods, and Granite Foods. Dkt. No. [15] at 10. In doing so, the Receiver Order suspended all power from the entities' current directors, officers, and managers. Id.

On July 22, 2016, Plaintiff sent Defendants a cease and desist letter. Dkt. No. [4] ¶ 27. Plaintiff also sent a notarized letter to the Receiver in which Defendant Hankerson states, "I acknowledge that neither I nor any of the entities I own have a current license to use the Gladys Knight name or likeness." Dkt. No.

[4-4] at 2. However, Plaintiff alleges that Defendants and the Receiver continue to use her likeness at the Restaurants. Dkt. No. [4] ¶ 28.

Plaintiff served the Amended Complaint and summonses on Defendants by personally serving Defendant Hankerson on August 30, 2016. Dkt. Nos. [6-9]. The Georgia Secretary of State's records show that Hankerson is the registered agent for Granite Foods; and while not the registered agent for Cascade Foods, Hankerson acts as one of its officers.[1] See Dkt. No. [16-6] at 2; Dkt. No. [16-1] ¶ 2.

The deadline for answering the Amended Complaint was September 20, 2016. When Defendants did not answer, Plaintiff filed a Motion for Entry of Default on September 21, 2016. Dkt. No. [10]. On September 22, 2016, the Clerk entered default against Defendants. However, Defendants filed their Answer that same day, along with Hankerson's Motion to Set Aside Default and the remaining Defendants' Objections. Dkt. Nos. [12, 14, 15].

II. LEGAL STANDARD

Pursuant to Rule 55, a court "may set aside an entry of default for good cause." FED. R. CIV. P. 55(c). While there is no "precise formula" for establishing when good cause to set aside a default exists, courts "have considered whether the default was culpable or willful, whether setting it aside would prejudice the adversary, and whether the defaulting party presents a meritorious defense."

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[1] Plaintiff avers that Rival was recently dissolved such that it has no registered agents or officers. It was included in the case, according to Plaintiff, to ensure total compensation for any judgment she might gain. She also served Rival through Defendant as its former officer.

Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion, 88 F.3d 948, 951 (11th Cir. 1996). However, these factors are not exhaustive, as "courts have examined other factors including whether the public interest was implicated, whether there was significant financial loss to the defaulting party, and whether the defaulting party acted promptly to correct the default." Id. While considering these factors, courts should keep in mind the Eleventh Circuit's "strong policy of determining cases on their merits." Fla. Physician's Ins. Co. v. Ehlers, 8 F.3d 780, 783 (11th Cir. 1993). Ultimately, the decision to set aside an entry of default is within the discretion of the Court. Robinson v. U.S., 734 F.2d 735, 739 (11th Cir. 1984).

III. DISCUSSION

As stated above, Defendant Hankerson has filed a Motion to Set Aside Default as to himself. In addition, the Receiver, on behalf of the remaining Defendants, has filed objections to the Clerk's entry of default. The Court will discuss Hankerson's Motion first.

In support of his Motion, Hankerson lists four reasons why the Court should set aside default. First, Hankerson asserts that he was not served with the initial Complaint, only the Amended Complaint. Hankerson argues that, because he did not have the initial Complaint, he believed he did not have to answer.[2] He then argues that this mistake was not intentional but merely neglectful and therefore excusable.

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[2] Hankerson argues in his brief that "[h]e was not served with a summons and complaint." Dkt. No. [14] at 4. However, in that very brief Hankerson admits to having been served with the Amended Complaint. It appears that Hankerson is

Plaintiff correctly argues that she was not required to serve Hankerson the initial Complaint because she had served him with the Amended Complaint. See Fountain v. Hyundai Motor Co., No. 1:15-CV-446-ELR, 2016 WL 4361528, at *2 (N.D. Ga. March 4, 2016) (citing Stephens v. Atlanta Indep. Sch. Sys., No. 1-13-CV-928-WSD, 2013 WL 6148009, at *3 n.3 (N.D. Ga. Nov. 22, 2013)). "Indeed, the law is clear that service of the original complaint is unnecessary when an amended complaint has been filed." Id.

However, Hankerson does not argue that he was not served with the initial Complaint and therefore service was improper. Instead, his argument suggets that he erroneously believed Plaintiff had to serve him with the initial Complaint and therefore he neglectfully did not answer. This sentiment is underscored by him calling his own actions neglectful rather than calling Plaintiff's actions improper. Hankerson goes on to argue that, because his actions were merely neglectful rather than intentional, the Court should set aside the default.

Next, Hankerson contends that he submitted his Answer promptly after notice of default. As discussed above, the submission deadline was September 20, 2016. Plaintiff filed a Motion for Default on September 21, 2016. Hankerson filed his answer on September 22, 2016, one day after notice of default.

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arguing he was not served with the *initial* Complaint, not that he was not served with any complaint.

Relatedly, Hankerson argues that his two-day delay did not prejudice Plaintiff and opening default now would not prejudice Plaintiff. Specifically, Hankerson contends that, because the default was merely procedural, if it were overturned, Plaintiff would simply have to litigate the issues on the merits, which itself is not inherently prejudicial.

Lastly, Hankerson contends that he has a meritorious defense. It is well settled that general denials or conclusive statements are insufficient to establish a meritorious defense. Turner Broadcasting Sys., Inc. v. Sanyo Elec., Inc., 33 B.R. 996, 1002 (N.D. Ga. 1983). Instead, a movant must present a factual basis for its defense. Id. (citing Gomes v. Willaims, 420 F.2d 1364, 1366 (10th Cir. 1970).

Hankerson contends that Knight did not properly terminate the license in accordance with the written Agreement. While Plaintiff alleges in her Amended Complaint that the written Agreement ended and she extended the license through a different oral agreement, Hankerson contends that she actually just renewed the written Agreement, which has different termination terms than her alleged Oral Agreement.

As discussed above, the written Agreement states that, during its ten-year term, Plaintiff can only terminate the license if Hankerson stops associating with Rival or the Restaurants. Dkt. No. [4-1] ¶ 2 ("If any time during the term of this Letter Agreement, Shanga Hankerson shall cease to be affiliated with The Rival Group, LLC, or the restaurant . . . you may terminate the permission to use your name and likeness."). Pursuant to the alleged Oral Agreement, however, Plaintiff could terminate the license if Defendants were intentionally or recklessly harming Plaintiff's reputation or providing sub-quality goods and services, which Plaintiff contends they did. According to Hankerson, because the written Agreement still controls and because Hankerson continued to associate with Rival and the Restaurants, Plaintiff was never permitted to terminate the license. As such, Hankerson argues her claim must fail.[3]

Plaintiff counters that Hankerson's defense is directly contradicted by his own, previously sworn affidavit. Specifically, Hankerson stated, "I acknowledge that neither I nor any of the entities I own have a current license to use the Gladys Knight name or likeness." Dkt. No. [4-4] at 2. Plaintiff asserts that, because Hankerson previously acknowledged in sworn testimony that he did not have a license in Plaintiff's likeness, he cannot now argue in his brief that he does.

As support, Plaintiff cites Insituform Technologies, Inc. v. AMerik Supplies, Inc., 588 F. Supp. 2d 1359, 1355 n.4 (N.D. Ga. 2008). In that case, this Court was determining whether to strike an affidavit because it contradicted previously sworn testimony. AMerik, 588 F. Supp. 2d at 1355 n.4. However, the

[3] Hankerson also asserts that, even if the written Agreement were terminated, he had an express or implied license from Plaintiff as evidenced by her continued cooperation and support of the Restaurants through July 2016. However, Plaintiff does not contend that there was no license between the termination date of the written Agreement in 2009 and July 2016. She readily admits there was an oral agreement that Hankerson and his entities could use her likeness. Instead, the issue in this case is whether Defendants could maintain the license *after* Plaintiff expressly demonstrated through her formal termination letter that she no longer consented to their use of her likeness. Therefore, Hankerson's argument that he had an express or implied license between 2009 and July 2016 is not meritorious because it does not touch upon the issue in this case.

Court did not strike the affidavit as Plaintiff's argument suggests. Instead, the Court determined that the competing testimonies went to the weight of the evidence rather than admissibility. Id.

The Court agrees with Insituform Technologies that, in this instance, Hankerson is not necessarily barred from bringing his defense simply because he swore in a statement made before the filing of this case that he no longer had a license. In fact, after sending the first notarized letter, Hankerson sent Plaintiff a second notarized letter formally clarifying his earlier testimony, asserting that it was intended only to assert that he did not have an *ownership* interest in Plaintiff's likeness, not that he was not permitted to use her likeness. Dkt. No. [16-8] at 3. The Court will not conclude at this stage of the case that Hankerson's statement bars his defense.[4]

Based on the foregoing, the Court agrees with Hankerson that default should be set aside. The Eleventh Circuit looks unfavorably upon default "because of the strong policy of determining cases on their merits." GulfCoast Fans, Inc. v. Midwest Elecs. Imps., Inc., 740 F.2d 1499, 1510 (11th Cir. 1984).

Here, there is no evidence that Hankerson purposefully chose not to answer the Amended Complaint. Instead, his mistake amounts to excusable neglect.[5] See Fla. Physician's Ins. Co. v. Ehlers, 8 F.3d 780, 783 (11th Cir. 1993) (finding that technical errors or slight mistakes should not deprive the movant of an opportunity to be heard).

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[4] Plaintiff asserts that Hankerson's defense is based on the Copyright Act, which is not at issue in this case. However, there is nothing in Hankerson's brief that suggests the defense discussed in this Order concerns the Copyright Act. While Hankerson may have asserted a Copyright Act defense in his Answer, the Court need not determine if *all* of his defenses are meritorious; it need only determine if Defendants have *one* meritorious defense.

Additionally, there is no evidence that the delay prejudiced Plaintiff in any way. As Hankerson argued, he filed his Answer within two days of the filing deadline and within one day of realizing his error.

Lastly, while the Court is not deciding whether Hankerson's defense prevents liability, it does find that the defense is potentially meritorious. If it is true that the written Agreement still controls and Plaintiff could not terminate the license, then Defendants might not be liable for Plaintiff's claim. As such, Hankerson's Motion to Set Aside Default is **GRANTED**.[6]

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[5] Plaintiff contends that the failure to respond was culpable because Hankerson received the First Amended Complaint and summons which explicitly informed him he had 21 days to answer. Additionally, Plaintiff points to the fact that Hankerson's attorney acknowledged receipt and stated that Hankerson would respond to the Amended Complaint "accordingly."

However, this does not necessarily show that Hankerson or his attorney knew he had to answer. His attorney's response was that he would respond *accordingly*. If the attorney erroneously believed he did not have to answer until he was served with the initial Complaint, her response might be to make no response. In the Eleventh Circuit, courts should not deprive a party of the opportunity to be heard based on an attorney's technical errors in answering a complaint. Fla. Physician's Ins. Co. v. Ehlers, 8 F.3d 780, 783 (11th Cir. 1993).

[6] In her response brief, Plaintiff made several arguments about Hankerson's actions and the actions of his attorney. Specifically, Plaintiff alleges that Hankerson's attorney threatened her by revealing potentially harmful information to the press. This, Plaintiff argues, prevented her from agreeing to set aside default. Although some of these actions are troubling, whether the attorney threatened Plaintiff and whether Plaintiff would have agreed to set aside default does not bear upon the issues currently before the Court at this time. As such, the Court will not address it further.

Turning to the remaining Defendants' objections, the Receiver argues that default should be set aside because Plaintiff did not properly serve Rival, Granite Foods, or Cascade Foods. Specifically, the Receiver argues that, based on the Receiver Order issued by the state court, Hankerson no longer had any authority to receive service of process for this lawsuit. Instead, Plaintiff should have served the Receiver.

Plaintiff objects, arguing that Federal Rule of Civil Procedure 4(h) only requires service upon "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process." FED R. CIV. P. 4(d). It does not, Plaintiff argues, specifically require a claimant to serve a court-appointed receiver if one exists.

The Court agrees. The language of Rule 4(h) states that service may be made upon either an officer/agent *or* an appointed receiver. It does not say that once a receiver is appointed, the claimant must serve process upon him or her. Additionally, while the Receiver Order vested decision making authority in the Receiver, Hankerson is still technically the agent/officer of the entities. Lastly, the Receiver has not pointed to any authority, and the Court cannot find any authority, that says service must be made upon a receiver once one is appointed.

As this was the Receiver's only argument for the remaining Defendants, the Court will not open default on that basis. Accordingly, Defendants' Objection is **DENIED.**

Nonetheless, it has come to the Court's attention that the Receiver has been removed from his position, and Defendants are now represented by Hankerson's counsel. See Lawson v. Hankerson, No. 2016CV02428-6 (Clayton Cty. Sup. Ct. Oct. 3, 2016). Because the sole legal argument in Defendants' Objection was made by legal counsel for Receiver, the Court is reluctant to deny the motion with prejudice before hearing from the current counsel representing these parties. For that reason, the Court will **DENY** the remaining Defendants' Objection **without prejudice** and allow them 14 days to, first, file an answer to the Amended Complaint, and second, file a renewed motion to set aside default if they so request. If after 14 days the remaining Defendants have not answered the Amended Complaint or filed a renewed motion to set aside default, the Court will consider Plaintiff's Motion for Default Judgment.

IV. CONCLUSION

In accordance with the foregoing, the Court **GRANTS** Hankerson's Motion to Set Aside Default [14]. The Court **DENIES without prejudice and with the right to re-file** the remaining Defendants' Objection to Default [15]. If the remaining Defendants choose to re-file their Motion, they have 14 days in which to answer the Amended Complaint and file a new motion to set aside default. The Clerk is **DIRECTED** to re-submit Plaintiff's Motion for Default Judgment [19] to the Court if Defendants fail to answer the Amended Complaint and re-file their Motion within 14 days of the date of this Order. The Clerk is further **DIRECTED** to strike entry of default as to Defendant Hankerson.

IT IS SO ORDERED this 20th day of November, 2016

Leigh Martin May
United States District Judge